This is the latest decision in the courts of the state to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the state, that the creditor obtains a lien upon the property of his debtor by the delivery of the *fieri facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed.

In this view of the subject it is unnecessary to examine or to remark upon the cases which have been decided in other states or in England, because the question depends altogether upon the law of Kentucky. And as by the laws of that state a *fieri facias*, when delivered to the sheriff, is a lien upon the property of the debtor while it continues in the hands of the officer to be executed, the creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. In the case before us, therefore, the court are of opinion that the defendant, by the prior delivery of the execution and the subsequent levy and sale, has the prior and superior title, and we shall certify accordingly to the Circuit Court.

THE UNITED STATES, PLAINTIFF, *v.* HEZEKIAH H. GEAR, DEFENDANT.

THE UNITED STATES, COMPLAINANT, *v.* HEZEKIAH H. GEAR, DEFENDANT.

The act of Congress entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26th, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act.

The said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the 3d March, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

The lands containing lead mines in the Indiana territory, or in that part of it made into new land districts by the act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.

The 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead-mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which au

thorized the President to lease any lead mine which had been, or might be, discovered in the Indiana territory, for a term not exceeding five years.

The land containing lead mines, in the districts made by the act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.

Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it.

THESE two cases came up from the Circuit Court of the United States for the district of Illinois, and involved the right of Gear, the defendant, to a tract of land upon which there was a lead mine. The first was an action of trespass *quare clausum fregit* on the common law side of the court; and the second a bill in chancery, with a prayer for an injunction to stay waste, on the equity side. The declaration charged Gear with having broke and entered the north half section 23, township 29 north, range 1 east, and the south half of fractional section 8, township 28 north, range 1 east, both being east of the fourth principal meridian, and then and there dug up the mineral lead ore, &c., &c.

The defendant filed six pleas, all resting on the ground that he had settled, resided on, and occupied the land in question in the year 1827, and cultivated a part thereof, and had ever since remained, continued, and still was in the possession thereof, and was lawfully entitled to the pre-emption right to said quarter section; said premises being subject to pre-emption rights, and not yet offered for sale by the President's proclamation; by reason whereof he, the defendant, dug lead ore or mineral, as he might lawfully do, &c., &c.

To these pleas the plaintiffs replied, in substance, that the quarter-section of land was, and always had been, the property of the plaintiffs; that it contained a valuable lead mine, the existence of which was well known to the defendant before and at the time he settled upon the land, &c.

To these replications the defendant demurred generally, and the plaintiffs joined in the demurrer.

The same principles were involved in the chancery case, alleged, of course, in a different manner.

When the cause came up for argument, in the court below, the judges were divided in opinion, and the questions duly certified to this court. They are somewhat differently stated in the two cases, and it is proper to mention both.

In the chancery case they are thus stated:

1. Whether the act of Congress, entitled "An act to create additional land districts in the states of Illinois, Missouri, and the territory north of the state of Illinois," approved June 26th, 1834, so far repeals the 5th section of the act of the 3d of March, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," as to subject the lands mentioned in said act of June 26th, 1834, containing lead mines, to be entered and

purchased by pre-emption under any of the pre-emption laws of Congress?

2. Whether the said act (1834) requires the President of the United States to cause lands containing lead mines to be sold, or only authorizes him to do so in his discretion?

3. Whether lands containing lead mines are subject to be held or purchased under any of the acts of Congress granting the rights of pre-emption to settlers upon the public lands?

4. Whether the digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to the allowance of a writ of injunction to restrain?

In the common law case they are thus stated:

1. Does the act of Congress, entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26th, 1834, require the President of the United States to cause to be offered for sale the public lands situate in the land district created by said act, containing lead mines?

2. Does the said act require the President to cause said lands, containing lead mines, to be sold, notwithstanding the 5th section of the act of the 3d of March, 1807, entitled "An act making provisions for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes?"

3. Are the said lands, containing lead mines, subject to pre-emption under any of the pre-emption laws which have been passed by Congress?

4. Does the 4th section of the said act of 1834 so far repeal the 5th section of the act of 1807, as to subject the public lands containing lead mines to be sold by the United States in the same manner as other public lands not containing lead mines?

5. Are the said lands, containing lead mines, subject to pre-emption or sale under any of the existing laws of Congress?

The acts of Congress referred to are the following:—

On the 3d of March, 1807, an act was passed, (1 Land Laws, 162,) by the 5th section of which it was enacted, "That the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine, which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null. And the President of the United States shall be, and he is hereby, authorized to lease any lead mine which has been, or may hereafter be, discovered in the Indiana territory, for a term not exceeding five years."

At that time the land now included within the state of Illinois was part of the Indiana territory.

In 1827, Gear, the defendant, entered upon the north half of section 23, township 29 north, of range 1 east, erected a house upon it, cultivated and occupied it.

On the 29th of May, 1830, Congress passed "An act to grant pre-emption rights to settlers on the public lands," the first section of which was as follows:

"That every settler or occupant of the public land prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby, authorized to enter with the register of the land-office for the district in which such lands may be, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum price of said land: Provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states in which any of the public lands may be situated."

The 4th section declared, that the sale of the public lands should not be delayed, nor should the act be available for those who failed to make proof and payment, and concluded as follows:

"Nor shall the rights of pre-emption contemplated by this act extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."

The act was to remain in force for one year after its passage.

On the 5th of April, 1832, Congress passed an "act supplementary to the several laws for the sale of the public lands," which permitted the public lands to be purchased either in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections, and contained three provisions, the third of which was as follows:

"Provided further, that all actual settlers, being house-keepers, upon the public land, shall have the right of pre-emption to enter, within six months after the passage of this act, not exceeding the quantity of one half quarter-section, under the provisions of this act, to include his or their improvements, under such regulations as have been, or may be, prescribed by the secretary of the Treasury," &c.

On the 14th of July, 1832, Congress passed "An act supplemental to an act granting the right of pre-emption to settlers on the public lands, approved on the 29th of May, 1830," which is too long to be quoted. The purport of it was to extend to occupants and settlers the privilege granted by the prior act until one year after the surveys had been made, or the land had been attached to a particular land district.

On the 2d of March, 1833, an act was passed reviving that of

April 5th, 1832, extending the privileges granted by that act to the same period as those just mentioned, and placing the beneficiaries of the two acts of the 5th of April and 14th of July upon the same footing.

In 1834, two acts were passed, one on the 19th and one on the 26th of June. That of the 19th was to revive the act to grant pre-emption rights to settlers on the public lands, approved May 29th, 1830.

The 1st section declared, that every settler or occupant of the public lands prior to the passage of the act, who was then in possession, and cultivated any part thereof in the year 1833, should be entitled to all the benefits and privileges provided by the act of 29th May, 1830; which act was revived and continued in force for two years.

The act of the 26th June was entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois."

The 4th section enacted, "that the President shall be authorized, as soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land-offices in the respective districts in which the land so offered is embraced, reserving only section 16, in each township, the tract reserved for the village Galena, such other tracts as have been granted to individuals and the state of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

On the 22d of June, 1838, an act was passed, the title of which was "An act to grant pre-emption rights to settlers on the public lands." It enacted that every actual settler of the public lands, being the head of a family, or over twenty-one years of age, who was in possession and a house-keeper, by personal residence thereon at the time of the passage of the act and for four months next preceding, should be entitled to all the benefits and privileges of the act of May 29th, 1830; which act was thereby revived and continued in force for two years. It contained a number of provisions, one of which was, that it should not be so construed as to give a right of pre-emption to any land specially occupied or reserved for town-lots or other purposes by authority of the United States.

By the act of the 1st June, 1840, the above act was continued in force until the 22d of June, 1842, subject to the exceptions therein contained.

On the 4th of September, 1841, an act was passed entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights."

The 10th section granted pre-emption rights to actual settlers, with several limitations and exceptions, two of which were as follows, viz.:

"No lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," and "no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

Nelson, attorney-general, for the United States.
Hardin, for the defendant.

Nelson. The early acts of Congress upon the subject are all stated in Mr. Gilpin's argument, 14 Peters, 529. The act of 1807 reserves all lead mines. If that act is still in force the case is clearly within it, because the replication avers the existence of a lead mine on this tract of land, and it is not controverted. If the case is withdrawn from the operation of that act, it must be through the effect of some one of the pre-emption laws. Let us inquire.

By the act of 1830, 1 Land Laws, 473, 474, chap. 401, there is no right of pre-emption in lands reserved from sale.

That of 1832 cannot apply, because there is nothing in the record to show that the defendant made an application for this land, and thus brought himself within the provisions of the act.

That of 1834 merely revived the act of 1830. Of course the same restriction was continued; and by that of 1838 it was continued for two years longer.

By the act of 1841, Session Acts, p. 26, chap. 16, section 10, no land is to be entered on which lead mines are.

In no act is there a pre-emption right varying from that given by that of 1830, except in the law of 1832, which says it shall be subject to such conditions as the secretary of the Treasury should impose. But, in making these conditions, it was his duty to conform to the settled policy of the country.

These acts may then be laid aside, as having no bearing on the case. The one under which the controversy arises is that passed in 1834. At this session, two acts were passed, viz.: 1834, chap. 467, passed on 19th June; 1834, chap. 527, passed on 26th June.

The 4th section of the latter act is the clause to which the attention of the court should be directed. It authorizes the President to offer for sale the lands therein mentioned, with certain exceptions; and it is contended, on the part of the defendant, that lead mines are not named in the exceptions, and that, consequently, the right of pre-emption accrued.

The question is, does this act repeal that of 1807, and authorize the President to sell without regard to the restrictions imposed upon him by the act of 1807? I think not; because,

1. The act of 1834 was not designed to bear upon that of 1807. It had a different object in view, professing to establish land-offices. There were two laws passed at that session, one seven days after the other. The one first passed provided for pre-emptions, and reserved.

lead mines. Is it probable that these provisions would be repealed by a law passed a few days afterwards, and purporting to regulate an entirely different matter?

2. In every subsequent act, of 1838, 1840, 1841, there is the same reservation as in 1830, which is a strong legislative exposition of the meaning of Congress. In the distribution law, it is repeated; and the practice of the executive department has always been to refuse to grant such lands.

3. There is another legislative interpretation. In 1842 (chap. 190) an act was passed, including Wisconsin in the act of 1834. Those who had entered lead mines were indemnified, and allowed to enter other lands, provided they did not violate the act of 1830.

4. By the section of 1834 under consideration, the President might offer the lands for sale, but it was not incumbent on him to do so. He had a discretionary power, which carried with it the right to refuse to sell them at the minimum price of one dollar and twenty-five cents per acre. See opinion of Attorney-General Butler, 2 Land Laws, 127, 128.

In 14 Peters, 526, the court has decided this question. In that case the contract for leasing was made after 1834. It is true, that the act was not noticed in the argument, but this shows the opinion to have been then, that the act had nothing to do with the subject. It was argued by Mr. Benton upon a different ground.

But suppose that the President was authorized to sell these lands. How does the right of pre-emption follow? This is a matter regulated by Congress only. Does the act of 1834 give a right of entry before the lands are offered at public sale? The act of 1830 might have thrown open all lands, then in the market, to pre-emption rights; but it does not follow that that of 1834 did so too.

As to the propriety of granting an injunction in the equity case, on the ground that the bill alleges, that the injury will be irreparable, see 2 Land Laws, 17; 3 Wheat. 131; 2 Story's Eq. 207, 208; Dewey on Injunctions, 137, 183, 184, 112.

Hardin, for defendant.

The act of 1807 reserved lead mines from sale, but left them subject to the future action of Congress. They were not appropriated to any particular purpose: no plan was adopted for their subsequent government. All that was done by that act was to say, that at some time thereafter Congress would consider what course should be taken with regard to them. They were, therefore, just as much open to the legislation of Congress as any other portion of the public lands. If an appropriation of them had been made, to take immediate effect, the case would have been different; for there is a distinction between reservation and appropriation. Grants made by executive officers were declared void; but this was not intended to guide future congressional action. By the act of 1830, pre-emption rights are given

in the broadest sense, except where lands are reserved for the United States. But they were often reserved for canals, light-houses, &c. As long as the act of 1807 was in force, we admit, that the act of 1830 did not give a right of pre-emption to the land in question, because it was reserved from sale. But the act of April 5th, 1832, permits quarter quarter-sections to be entered, and extends the privilege to all house-keepers, who had settled on the public lands, in the broadest possible terms. The defendant's plea shows him to have been entitled to claim it. There was no reservation in the act. It has been said, by the attorney-general, that no settlement could be made on lands which had not been offered for sale, and that the secretary of the Treasury must prescribe regulations. But the very term implies a recognition of a settlement thus made. What is it? Pre-emption: a right to purchase before the day of public sale. Before the passage of such a law, a settler was an intruder; but afterwards, he had an estate upon condition. And if he complied with the act, he fulfilled the condition, and the estate became absolute. It has been called a gift. But if so, it was a gift under a legislative grant, which, in effect, vests the title, of which a subsequent patent is only the evidence. 2 Kent, 255; 4 Peters, 408, 422; 2 Howard, 316, 344.

Being so, it was not in the power of the President or any executive officer to take it away.

If we look to results, they are all in our favour. The object of Congress, in making the original reservation, was to prevent monopoly, but not the general settlement of the country. The leasing system has not paid expenses, and it injures the land. The secretary of War has, for many years, recommended that the lead mines should be sold; and we say, that Congress has ordered it, but that the President has improperly withheld them from sale.

By the act of 26th June, 1834, the President was authorized to sell the public lands with certain reservations, and these are not within the reservations. But the attorney-general says, that the President was only authorized to sell; that it was a matter within his discretion. Be it so. This removes them from the list of reservations; and being no longer reserved, the pre-emption law of the 19th June comes in and operates upon them. What construction must be given to the word "authorized?" We say, it makes it the duty of the President to sell.

It is not only used so in the act of 26th June, 1834, but in all acts in which Congress directs or authorizes land to be sold by order of the President. As in these acts: February 17th, 1818, sect. 3, Land Laws, 294; March 3d, 1823, sect. 10, Land Laws, 364; July 14th, 1832, sect. 2, Land Laws, 511; July 7th, 1838, sect. 1, Land Laws, 578; March 3d, 1815, sect. 5, Land Laws, 260; May 6th, 1812, sect. 1, Land Laws, 214.

Congress never does order the President in imperative terms. The

language is courteous; but it is a ministerial act to proclaim the lands for sale. Grignon *v.* Astor, 2 Howard, 344.

This power can be exercised by other officers than the President; and in the following cases other subordinate officers are authorized, *alias* directed, to make sales, &c.: secretary of War, March 3d, 1803, sect. 2, Land Laws, 99; secretary of Treasury, March 3d, 1825, sect. 1, Land Laws, 403; registers and receivers, April 27th, 1816, sect. 1, Land Laws, 274; April 30th, 1810, sect. 1, Land Laws, 176; "proper officer," May 13th, 1800, sect. 1, Land Laws, 78; "commissioners," July 14th, 1832, sect. 2, Land Laws, 510. See also, acts 23d August, 1842, sect. 2, Acts, 124; 4th August, 1842, sect. 1, Acts, 83; 10th May, 1842, sect. 1, Acts, 14.

These lead-mine lands being authorized to be sold, without any reservation, and no power existing in the President to reserve them from sale, more than any other public lands, so much of the law of 1807, as "reserved them for the future disposal of the United States," was necessarily repealed by the act of 1834. The reservation being taken off, they become subject to rights of occupancy, as other lands, and settlers acquiring rights to pre-emption, by virtue of pre-emption laws, cannot be divested of these rights by the refusal of the President to proclaim them for sale.

If the pre-emption laws, passed prior to the act of 1834, did not give the defendant a right of pre-emption, the pre-emption law of 1838 did. This act makes no mention of reserving lead mines. It is provided in this act, that it shall not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

These lead-mine lands were not occupied or reserved for any purpose by the United States. They were, in 1807, reserved from sale for future disposal; but nowhere are they appropriated or reserved for the use of the government, to dig mineral, or other special use. The object of the original reservation was to delay the sale until Congress should determine what disposition should be made of them. By the law of 1834, and the various pre-emption laws, Congress has authorized their sale and disposal, and they are not, consequently, within the meaning of any reservation or appropriation mentioned in the subsequent pre-emption laws.

On all public lands, authorized to be sold, citizens are permitted and encouraged, by the pre-emption laws, to go on them and improve them. To do so, they must erect houses break up the natural meadow, and fell trees. These are all acts of waste, according to the common law.

The old acts of Congress against waste, and to punish for trespasses in cutting timber, &c., are inconsistent with these pre-emption laws, and the rights and privileges granted to occupants under them; consequently, they are repealed by the pre-emption laws subsequently passed. Neither action can therefore be sustained.

Nelson, in reply and conclusion.

The question of a general reservation does not arise in the case. The replication sets out, that defendant knew that mines were on the land; and by his demurrer he admits that he knew it. The act of 1807 reserves mines, and declares, that all grants of them shall be considered fraudulent and null. Under this act alone, the defendant would have been a trespasser, even if he had obtained a grant of the land.

It has been said, that the district attorney had no right to bring suit without the authority of an act of Congress. But the Constitution makes it the duty of the President to see that all laws are executed, and the power to sue results from the nature of things.

The act of 1830 is the first and general pre-emption law; and no law, now in force, is inconsistent with this. It says that its provisions do not apply to lands which were reserved from sale; but the act of 1807 had already reserved these lands.

The act of April, 1832, has no application. It was not designed as a pre-emption law, but to allow smaller subdivisions than had been before tolerated. The claim here is not for one of these subdivisions, but an entire quarter-section. But the privilege granted by the act of 1832 is confined to half quarter-sections, and extends to no larger amount.

The act of July, 1832, merely gave an extension of time.

The act of 1834 appears to be the chief reliance of the defendant. We admit, that if the court think that this act grants the lands, the plaintiff is not entitled to maintain this suit. But it does not profess to be a pre-emption act. It is to create additional land-districts. It authorizes the President to do certain things in the manner prescribed by law. But a pre-emptioner can only claim under an act of Congress, and this act does not give him power to enter, which is expressly prohibited by the act of 1830. It does not follow that any pre-emptioner may take up lands as soon as their sale is authorized. No statute gives him such a right. The question is, what was the intention of Congress in passing this law? The answer must be sought in the act itself, and in the circumstance that, seven days before, a regular pre-emption law had been passed.

The act of 1838 contains many reservations, and it is argued that mines are not included within them. But the general phrase, "for other purposes," will include mines; and besides, it professed to revive the act of 1830, with all its reservations.

Mr. Justice WAYNE delivered the opinion of the court.

From the foregoing statement of all the acts of Congress having any bearing on the subject before us, we think it obvious it was not intended to subject lead-mine lands in the districts made by the act of the 26th June, 1834, to sale as other public lands are sold, or to make them liable to a pre-emption by settlers.

The argument in support of a contrary conclusion is, that the reservations in the fourth section of that act, with the authority given to the President to sell all the lands in the districts, any law of Congress heretofore existing to the contrary notwithstanding, exclude lead-mine tracts in those districts from the operation of the act of the 3d of March, 1807. At most, the language of the fourth section of the act of 1834 imparts only an authority to the President to sell, given in the same way as it has been conferred upon him in other acts providing for the sale of the public lands. Then the question occurs, whether the section of an act, in general terms to sell, (certain reservations excepted,) without any reference to a previous act, which declares that lead mines in the Indiana Territory shall be reserved for the future disposal of the United States, is so far a repeal of the latter, that lead-mine lands in a part of that territory are subjected to sale as other public lands are. Why should Congress, without certain words showing an intention to depart from the policy which had governed its legislation in respect to lead-mine lands in the whole of the Indiana Territory, from 1807 to 1834, be supposed to have meant to exempt a portion of the lead-mine lands in that territory from that policy, in an act, the whole purview of which was to create additional land-sale districts? Besides, the reservations in the fourth section of the act of 1834, except the tract for the village of Galena, are no more than the reaffirmance of some of the provisions of other statutes respecting reservations made or to be made out of the public lands in other districts; and cannot, therefore, be considered as an enumeration in connection with the general power to sell all lands, any law of Congress heretofore existing to the contrary notwithstanding, repealing another act, providing for a reservation of a particular class of lands within the same land-district to which the act of 1834 applies. The reservations in the fourth section of the act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power of the President to sell lands, which, by law, he never had a power to sell; which have always been prohibited by law from being sold, and which never have been sold, except under the authority of a special statute, such as that of the 3d March, 1829, 1 Land Laws, 457, which authorized the President to cause the reserved lead mines in the state of Missouri to be sold. In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead-mine lands, or to come to the conclusion that the reservations of them can only be released by special legislation upon the subject-matter of such reservations. Authority, then, to sell all lands in the districts made by the act of 1834, though coupled with the concluding words of the fourth section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale, by force of law. The propriety of this interpretation of that section is more manifest, when it is considered, if a contrary inter-

pretation is given, that the lead-mine lands in one district of the same territory would be liable to sale and pre-emption, and those in another part of it would not be. Can any one possible reason be suggested to sustain even the slightest intention upon the part of Congress, when it was passing the act of 1834, to make such differences in respect to lands within the same locality, as have just been mentioned? Could Congress have meant to say, under a power to sell, that it would be lawful to sell in the new land district what it was unlawful to sell in other land districts of the same territory of which the new land district was also a part? And that settlers upon the public lands within the new district should have a right of pre-emption in lead-mine tracts, which settlers upon other lands within the same territory, but not within the new land district, could not have? The mere fact of a new land district having been made out of a part of the territory in which the lead-mine lands had been reserved, with the authority to the President to sell all lands in the new district, can have no effect to lessen the force of the original reservation. In truth, the acts of 1834 and 1807 do not present a case of conflict in the sense in which statutes do, when, from some expression in a later act, it may seem that something was intended to be excepted from the force of the former, or to operate as a partial repeal of it. The rule is, that a perpetual statute, (which all statutes are unless limited to a particular time,) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. Thus in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserving lead-mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first—each performing its distinct functions within the sphere as Congress designed they should do. But further, that the act of 1834 was not intended as a repeal of the act of 1807, in regard to lead mines, so as to grant a right of pre-emption in them to settlers, is manifest from the fact that an act was passed only seven days before it, reviving an act to grant pre-emption rights to settlers on the public lands, which excludes settlers from the right of pre-emption in any land reserved from sale by act of Congress. Thus reasserting, then, what had been uniformly a part of every pre-emption law before, and what has been a limitation upon the right of pre-emption in every act for

that purpose since. We do not think it necessary to pursue the subject further, except to say that the view we have here taken of the act of 1834, in respect to lands containing lead mines, and the right of pre-emption in them, is coincident with the opinion given by this court in the case of Wilcox *v.* Jackson, 13 Peters, 513. That case was well and most carefully considered, and expressed in the deliberate language of this court. We determined, then, the point being directly in the cause, that the act of 1834 had relation to a sale of lands in the manner prescribed by law, at public auction, and that a right of pre-emption was governed by other laws. The court said, "the very act of 19th June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, (meaning the act of 26th June, 1834,) thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated." We see no reason to change what was then the view of the court. On the contrary, there is much in this case to confirm it. Let it be certified, therefore, to the judges of the Circuit Court of the United States for the district of Illinois, that this court is of the opinion that the act of Congress, entitled "An act to create additional land-districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26, 1834, *does not require* the President of the United States to cause to be offered for sale the public lands *containing lead mines* situated in the land districts created by said act. 2d. That the said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the 3d March, 1807, entitled "An act making provision for the disposal of the public lands, situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

To the third question we reply, that the lands containing lead mines in the Indiana Territory, or in that part of it made into new land-districts by the act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.

To the 4th question, we reply that the 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d of March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which *grants* for lead-mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might be, discovered in the Indiana Territory, for a term not exceeding five years.

To the 5th question we reply, that the land containing lead mines in the districts made by the act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.

The foregoing answers apply also to the points upon which the judges were divided in opinion upon the bill in chancery, between the United States and the defendant Gear, except the fourth question certified in that case; and to that we reply, that digging lead ore from the lead mines upon the public lands in the United States, is such a waste as entitles the United States to a writ of injunction to restrain it.

[For the dissenting opinion of Mr. Justice McLEAN, see App. p. 789.]

SAMUEL GORDON, PLAINTIFF IN ERROR, *v.* THE APPEAL TAX COURT.

JAMES CHESTON, PLAINTIFF IN ERROR, *v.* THE APPEAL TAX COURT.

The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it, which the legislature accepted.

But the corporate property of the bank is separable from the franchise, and may be taxed, unless there is a special agreement to the contrary.

The legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition, that they would make a road and pay a school tax. This would have exempted their franchise, but not their property, from taxation.

But another clause in the law provided, that upon any of the aforesaid banks accepting of and complying with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act.

This was a contract relating to something beyond the franchise, and exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

THESE were kindred cases, brought up by writ of error from the Court of Appeals of the state of Maryland, under the 25th section of the Judiciary Act of 1789.

The first case depended upon the constitutionality of a tax imposed by the legislature of Maryland in 1841, it being alleged to be in violation of a contract made by the legislature in 1821; and the second depended upon the same circumstance, with the addition that the plaintiff in error was entitled to the benefit of the same contract, by virtue of an act of the General Assembly, passed in 1834.

The facts in the case were these:—

At November session, 1804, the legislature of Maryland incorporated the Union Bank of Maryland. Samuel Gordon, the plaintiff in error in the first case, was, at the institution of the suit below, a stockholder in this bank. No bonus was required to be paid to the state, but five thousand shares were reserved for the use and benefit of the state of Maryland, to be subscribed for by the state, when desired by the legislature thereof. The charter was to last until 1816.

At the session of 1812, the legislature passed an act, entitled "An act to incorporate a company to make a turnpike road leading to Cumberland, and for the extension of the charters of the several